

BRB Nos. 92-2126
and 92-2126A

PHILLIP H. WOZENCRAFT)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION AND ORDER

Appeals of the Decision and Order on Remand and the Supplemental Decision and Order
Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United
States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured
employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (88-LHC-3364) of Administrative Law Judge Ben H. Walley awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. In his initial decision in this case the administrative law judge granted claimant's motion for summary judgment and found that claimant,

a retiree, should be compensated for his work-related hearing loss pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23), of the Act. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$625, to be paid by employer.

Employer appealed these decisions to the Board. Employer subsequently moved to remand the case to the administrative law judge for further action consistent with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), in which the court held that a retiree's hearing loss benefits are to be calculated pursuant to Section 8(c)(23). In an Order dated November 8, 1991, the Board granted the motion to remand. *Wozencraft v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-593/A (Nov. 8, 1991)(order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). Lastly, the Board vacated the attorney's fee award and instructed the administrative law judge to reconsider the fee in light of his decision on remand.

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 2.1 percent binaural loss converted to a 1 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge further found that employer is liable for a Section 14(e) penalty. The administrative law judge rejected employer's contentions that it is not liable for the penalty because it was "excused" from filing a notice of controversion by the district director. The administrative law judge also reaffirmed the attorney's fee award to claimant's counsel.

Claimant's counsel subsequently filed an additional fee petition for work performed before the administrative law judge on remand from November 12, 1991 through June 16, 1992, requesting a fee for 4.5 hours of services rendered at \$125 per hour, plus expenses of \$33.50, for a total fee of \$596. Employer thereafter submitted objections to counsel's fee request. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, addressing employer's objections to the fee requested, found that the requested hourly rate of \$125 sought by claimant's counsel was reasonable and that the time requested was necessary; the administrative law judge thus awarded claimant's counsel the requested fee of \$596.

Claimant appeals the administrative law judge's decision on remand; in his brief he states that he wishes to preserve his right to seek an award pursuant to Section 8(c)(13) inasmuch as the United States Court of Appeals for the First Circuit in *Bath Iron Works Corp. v. Director, OWCP [Brown]*, 942 F.2d 811, 25 BRBS 30 (CRT)(1st Cir. 1991) held that retirees' hearing loss awards are to be calculated pursuant to Section 8(c)(13), and the Supreme Court granted *certiorari* in *Brown* in order to resolve the split in authority between the First and Fifth Circuits. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

In *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), the United States Supreme Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13). Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries.

Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Inasmuch as the administrative law judge's finding that claimant has a 2.1 percent binaural hearing loss is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13) of the Act.

In its appeal, employer contends it is not liable for an attorney's fee for work performed in the proceedings on remand, and that if it is liable, the fee awarded is excessive. Employer incorporates by reference into its appellate brief the arguments it made below regarding the number of hours and the hourly rate requested.

Initially, employer contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that as claimant did not receive any additional compensation over that which employer voluntarily paid, there was no successful prosecution of the claim. Employer did voluntarily commence payment of benefits to claimant prior to the transfer of the case to the administrative law judge, thereby precluding its liability under Section 28(a) of the Act, 33 U.S.C. §928(a). Employer, however, is liable for claimant's attorney's fees pursuant to Section 28(b), 33 U.S.C. §928(b). Employer commenced voluntary payment of compensation for a 1 percent impairment of the whole man pursuant to Section 8(c)(23) of the Act on August 24, 1988, prior to referral of the case to the Office of Administrative Law Judges. Claimant, however, continued to assert his entitlement to benefits for a 2.1 percent binaural hearing impairment pursuant to Section 8(c)(13) of the Act, and a penalty pursuant to Section 14(e). Although on remand the administrative law judge modified his award of compensation to reflect claimant's entitlement to benefits to the amount employer had voluntarily paid, the administrative law judge ordered employer to pay a penalty in accordance with Section 14(e). In addition, this decision modifies the administrative law judge's Decision and Order on Remand to reflect an award of permanent partial disability benefits

for claimant's hearing loss pursuant to Section 8(c)(13) of the Act. Therefore, inasmuch as a controversy remained after employer voluntarily paid benefits and claimant was successful in obtaining additional benefits over that which employer voluntarily paid, we affirm the administrative law judge's finding that claimant's attorney is entitled to a fee for work performed in the proceedings on remand assessed against employer pursuant to Section 28(b) of the Act. *See generally Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995).

Employer also contends that the lack of complexity and the amount of benefits awarded in the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. Employer further avers that claimant obtained only a nominal award and the fee awarded therefore should be limited in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). Employer did not raise these issues before the administrative law judge, and is not permitted to raise them for the first time on appeal. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 46 F.3d 66 (5th Cir. 1995). We thus decline to address these contentions.

Employer next contends that the hourly rate awarded by the administrative law judge is too high for the geographic region in which this case arose. The administrative law judge specifically found that the instant case could not be resolved by negotiation, and that the hourly rate suggested by employer is inappropriate in that claimant's counsel bears a different burden than does defense counsel. The administrative law judge concluded that the high level of skill in preparation and presentation of the case warranted the hourly rate of \$125. Employer has not established that the administrative law judge abused his discretion in awarding an hourly rate of \$125, and we accordingly affirm it. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

We further reject employer's contention that certain itemized entries represent services that were either unnecessary or excessive.¹ After evaluating claimant's fee petition in light of employer's objections, the administrative law judge found the services rendered by claimant's counsel to be reasonable and necessary. We decline to disturb these rational determinations.² *Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Decision and Order on Remand is modified to

¹Employer did not contest the fee petition before the administrative law judge on the basis that claimant's counsel's method of minimum increment billing was improper, and thus it may not raise the issue before the Board. *See Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

²For the reasons stated in *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993), we reject employer's reliance on the Board's decision in *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished). We also reject employer's reliance on the decision of Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sept. 5, 1991). The decision of a different administrative law judge in a different case is not binding upon the administrative law judge or the Board in this case. 33 U.S.C. §928(c); 20 C.F.R. §702.132.

reflect claimant's entitlement to benefits for a 2.1 percent binaural impairment pursuant to Section 8(c)(13). In all other respects, the administrative law judge's Decision and Order on Remand is affirmed. In addition, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge